No. 93-633

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

THE AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

vs.

LEXEN PITTMAN, by his next friend, Ramona Pope,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondent LEXEN PITTMAN, through undersigned counsel, opposes the Florida AGENCY FOR HEALTH CARE ADMINISTRATION's Petition for Writ of Certiorari review of the July 29 and August 3, 1993 Orders of the United States Court of Appeals for the Eleventh Circuit granting preliminary injunctive relief. Those Orders compel the State of Florida to provide funding for a liver/bowel transplant pursuant to 42 U.S.C. § 1396d(r)(5) for Respondent, a Medicaid-eligible 15-month old child. It is undisputed that Lexen Pittman cannot long survive without a liver-bowel transplant. (Respondent's Appendix A and B) [hereinafter Resp. App. ___]).

The District Court in response to the Eleventh Circuit Order of July 29, 1993, convened a hearing on August 2, 1993. Immediately preceding the hearing, Petitioner agreed to pay seventy-five percent of the cost of charges for transplant services which agreement was incorporated in the Preliminary Injunction Order of August 2, 1993.(Petitioner's appendix 81-82[hereinafter Pet. App. _____]). Subsequently, Lexen was immediately placed on the list at Children's Hospital of Pittsburgh to receive a liver/bowel transplant and he currently has been re-admitted to the local hospital intermittently due to bouts of infection as he awaits a donor.

Despite its agreement to pay 75% of billed charges, Florida Medicaid moved for a stay of the District Court Order of August 2, 1993, which motion was immediately denied by the Eleventh Circuit on August 12, 1993. (Pet. App. 182-183). On September 10, 1993,

the District Court ordered that the Preliminary Injunction be made permanent. An appeal of that order by Petitioner is presently pending before the Eleventh Circuit Court of Appeals. (Resp. App. C). On August 18, 1993 the Agency applied for a Stay Pending Certiorari review of the July 29 and August 3, 1993 Orders of the Eleventh Circuit. Justice Anthony M. Kennedy denied the application on August 20, 1993. (Resp. App D).

For the reasons that follow, the Petition fails to establish the prerequisites for the granting of certiorari review, and should be denied.

REASONS FOR DENYING THE WRIT

A. No Conflict Exists Among the Circuit Courts.

A principal purpose for which the Court uses certiorari jurisdiction is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning and provisions of federal law. Braxton v. United States, 111 S. Ct. 1854 (1991); U.S. Sup. Ct. Rule 10.1, 28 U.S.C.A.

Petitioner misleads the Court in stating that the writ should be issued to eliminate the "conflict between the Circuit and federal courts. "(Pet. Br. 8). No conflict exists among the circuit courts of appeal on the dispositive issue in this case of whether 42 U.S.C. § 1396d(r)(5) (mandating medically necessary procedures for Medicaid-eligible children under 21) is consistent with, or supersedes, § 1396b(i)(1) (governing transplant funding).

The only two circuits which have addressed the interplay between these two sections are in agreement. The Eleventh Circuit

in the case below, Pittman v. Secretary, Dept. of HRS, 998 F. 2d 887, 891 (11th Cir. 1993), expressly adopted the Fourth Circuit's reasoning from Pereira v. Kozlowski, 996 F. 2d 723 (4th Cir. 1993), which held that a state must pay for medically necessary transplants to children under twenty-one who are otherwise qualified under the early and periodic screening, diagnostic, and treatment services [EPSDT] provisions of the Medicaid Act.

In Pereira, Circuit Judge Luttig reached that conclusion after thoroughly examining the legislative history of 42§ 1396 b(i)(1), even though he deemed the resort to legislative history as undertaken by the court in Ellis v. Patterson, 859 F. 2d 52 (8th Cir. 1988), to be not only unwarranted but improper, considering the plain language of the statute. The Court concluded:

> We are not unaware of the potential consequences of our decision today. Our responsibility, and the limit of our authority, however, is to interpret the law as it has been enacted by Congress.
> ... It may even be... that Congress intended by the latter provision [§1396 b (i) (1)] to afford the states absolute discretion whether to fund organ transplants. If it did so intend, however,...it did not embody that intention in statute.
>
> Pereira at 727.

The Eleventh Circuit in Pittman, recognizing the exigency of Lexen's situation, expediently issued a written decision in his favor on the day following oral argument. In contrast, the Florida medicaid agency had delayed a written decision on his request for payment for a liver-bowel transplant for several months, finally denying him on the basis that the procedure was considered

experimental, and therefore, not covered under the medicaid program. (Resp. App. E). At the initial status conference on the Motion for Preliminary Injunction, however, the agency changed its position and waived the experimental issue as the Court pointed out in Pittman at 888.

Such an approach appeared strategically reasonable in light of McLaughlin v. Williams, 801 F. Supp. 633 (S.D. Fla. 1992), a case directly on point, in which Florida Medicaid had raised the issue and lost. Judge Marcus in McLaughlin examined in depth the criteria that must be considered in determining whether a procedure is experimental. Expert testimony established that in a two year period, seventeen patients at Pittsburgh received transplants of either the liver and small bowel or small bowel. Omitting two, fourteen out of fifteen survived, a ninety-three percent success rate. This evidence, in conjunction with other factors, led the Court to conclude that a liver-bowel transplant was non-experimental. McLaughlin did not consider the issue of whether the EPSDT amendments repealed by implication 42 U.S.C. 1396b(i)(1) as Petitioner implies. (Pet.Br. 10-11). Rather, the court in McLaughlin, after disposing of the experimental issue, soundly decided the issue on the narrowest grounds by mandating coverage solely under the EPSDT provisions.

The Eleventh Circuit in Pittman relied on McLaughlin in considering the issue of medical necessity as applied to a liver-bowel transplant and its analysis of EPSDT. The Court basically mirrored the reasoning of Perreira concerning the relationship of

§ 1396 b(i) (1) to § 1396 d(r) (5), concluding like Perreira, that § 1396 d(r)(5) expressly requires medicaid coverage for a liver-bowel transplant. Pittman at 891-892.

While the Eighth and Ninth Circuits have found that states have discretion to deny coverage for transplants for adults under § 1396b(i)(1), those circuits have not considered the impact of the later-enacted § 1396d(r)(5) on transplants to minors. Miller v. Whitburn, 816 F. Supp. 505 (W.D. Wisc. 1993), appeal docketed No. 93-1976 (7th Cir. argued June 10, 1993), does involve a liver-bowel transplant for a minor child, and is awaiting decision before the Seventh Circuit.[1]

Respondent even misrepresents the significance of two federal district court transplant cases in which undersigned counsel Kimble represented the respective plaintiffs: Lisa Cooley v. Robert Williams, CCH Par. 40916 (N.D. Fla 1991) and Alderman v Williams, No 92-1388-Civ-T-99C (M.D. Fla. 1992)(Pet.Br.10). The Cooley case which did involve a minor was not appealed because Lisa Cooley died the night of the Preliminary Injunction hearing. Moreover, the EPSDT section which mandates coverage for children was not addressed in her case. Alderman elected not to appeal because his transplant was subsequently covered under medicare. The EPSDT provision was inapplicable to him because he was an adult. In any

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[1] Since the Pereira and Pittman Circuit Court decisions issued subsquent to the District Court decision pending appeal in the Seventh Circuit, there is no reason to believe that the decision there will differ from the Fourth and Eleventh Circuits.

event, Cooley and Alderman, both unpublished decisions, have each been rendered invalid by the Eleventh Circuit decision in Pittman.

Nor is there an important, substantial, federal question ripe for review. See discussion of whether 42 U.S.C. § 1396 d (r)(5) creates a private cause of action under § 1983, infra at subsection (b). Even if one existed, the Agency's petition is premature because its Appeal of the District Court Order issuing a Permanent Injunction is currently pending before the Eleventh Circuit.

b. An enforceable § 1983 action exists pursuant to 42 U.S.C. § 1396 d (a)(4)(B) and § 1396d (r)(5) of the Medicaid Act.

The Agency frames the § 1983 issue as "Whether there is a Private Right Enforceable by 42 U.S.C. 1983 to compel a state medicaid program to fund a liver-bowel organ transplant operation it has chosen not to cover." (Pet. Br. i). The only other specific indication in the petition of the particular provision of the Medicaid Act which the Agency claims is unenforceable under § 1983 is a reference to the defenses raised below: "that 42 U.S.C. 1396b (i)(1) did not create a private right of action." (Pet. Br. 2). However, Lexen claims a § 1983 right of action under the EPSDT provisions of the Medicaid Act: 42 U.S.C. § 1396 d(a)(4)(B) and § 1396 d(r)(5). (Pet. App. 169). Futhermore, the Agency's reliance on Suter v. Artist, 112 S. Ct 1360 (1992) and Pennhurst State School and Hospital v. Halderman, 101 S. Ct. 1531 (1981), which were not medicaid cases is unapplicable to whether particular provisions of the Medicaid Act give rise to § 1983 violations.

In addition to the cases cited supra in which the courts have upheld § 1983 actions as applied to minors seeking organ transplants, Florida Medicaid's argument would eradicate an established line of cases upholding a § 1983 cause of action under the Medicaid Act. In Wilder v. Virginia Hospital Association, 110 S. Ct. 2510 (1990) this Court held that Congress did not forclose a private judicial remedy for enforcement of the Medicaid Act under 42 U.S.C. § 1983. Id at 2519. Indeed, the cases cited in the petition were brought under § 1983 without objection by the defendants or the courts. See e.g. Miller v. Whitburn, 816 F. Supp 505, 506 (W.D. Wis. 1993) ("[Plaintiff's § 1983] claim is substantial enough to avoid dismissal for lack of jurisdiction whether or not it succeeds on the merits."); Ellis v. Patterson, 713 F. Supp 292, 294 (E.D. Ark 1988), vacated and remanded, 859 F.2d 52 (8th Cir. 1988). See also Wood v. Wallace, 825 F. Supp. 177 (S.D. Ohio 1993) (analyzing Wilder, distinguishing it from Suter, and finding a private cause of action in a different section of the Medicaid Act; certifying the question for an interlocutory appeal).

Additionally, Visser v. Taylor, 756 F. Supp. 501, 507 (D. Kan. 1990), which required medicaid coverage for Clozapine, discussed at least fourteen cases which upheld § 1983 claims under the Medicaid Act. Some examples of these medicaid cases are Mitchell v. Johnston, 701 F. 2d 337 (5th Cir. 1983) (dental services under EPSDT); Allen v. Mansour, 681 F. Supp. 1232 (E.D. Mich, 1986)

(liver transplant); and Ledet v. Fisher, 638 F. Supp 1288 (M.D. La. 1986) (eyeglasses).

Even assuming arguendo that Suter can be analogously considered, it is distinguishable from the instant case as it was from Wilder. The provisions of 42§ 1396 d(a)(4)(B) and § 1396 d (r)(5) clearly mandate EPSDT services for eligible individuals under 21 and define them to include "... such other necessary health care ... to correct physical illnesses discovered by the screening services." Accordingly, such language should be interpreted as mandatory pursuant to Wilder and Wood, not precatory as in Suter.

C. Non-experimental Organ Transplants Constitute Necessary Medical Care

The agency exaggerates the effect of the Federal Court decisions mandating payment for organ transplants in stating: "[t]he situation now, very simply, is that Florida cannot refuse to fund any organ transplant operation for persons under 21 and, arguably for anyone, no matter what the cost, no matter how little efficacy there may be, at the expense of other Medicaid recipients." (Pet. Br. 8).

Petitioner wrongly characterizes the thrust of the Court decisions which have placed limits on the nature and cost of the type of transplants for which Medicaid must pay. Medicaid must fund organ transplants only when they are non-experimental, and therefore, efficacious. (McLaughlin at 638 citing to the standards concerning medical necessity as discussed in Rush v. Parham, 625 F.

2d at 1156 n. 11.) Such procedures become less expensive as the patient's recovery time decreases and they become more common. (See complaint, para.10, Pet. App. 4).

CONCLUSION

The agency's unfounded speculation concerning the financial consequences of this case has clouded its legal perspective, motivating it to file a petition for Writ of Certiorari despite it's agreement to pay 75% of billed charges; its pending appeal in the Eleventh Circuit of the Order granting a Permanent Injunction; and the concurrence of two circuit courts which have rejected the arguments it presents to this Court.

The Fourth and Eleventh Circuits have interpreted the law as it exists to mandate payment for a medical procedure which provides the only hope of survival for Lexen. These Court decisions which soundly construe the law, giving priority to the value of a human life over financial considerations, should remain undisturbed.

For all the forgoing reasons, Respondent Lexen Pittman respectfully requests that the Petition for Writ of Certiorari be denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN

Plaintiff

CASE NO. 93-6461-CIV-ROETTGER
MAGISTRATE SELTZER

by his next friend,
Ramona Pope

vs.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant.
_____/

AFFIDAVIT OF DR. MARIO TAÑO

BEFORE ME, a notary public, in and for the state of Florida, duly authorized to administer and take acknowledgements, personally appeared DR. MARIO TAÑO, who, being by me first duly cautioned and sworn, under oath, deposes and says:

I am licensed as a physician by the State of Florida. My specialty is pediatric gastroenterology and I am a diplomate of the American Board of Pediatrics.

Lexen Pittman is an unfortunate 13-month-old infant who suffers from short-bowel syndrome; a large portion of his small intestine was resected in radical surgery when he was approximately 7 days old. As a result his body is unable to absorb nutrients; functionally, he receives all his nutritional needs from total parenteral nutrition (TPN), which is a form of intravenous feeding. This form of feeding has resulted in impairment of liver function and this child is now in liver failure.

PLAINTIFF'S EXHIBIT 9

Lexen has required inpatient hospitalization on a frequent basis. He has probably spent more of his life in Broward General, than he has at home. As of this date he is hospitilized at Broward General, having been readmitted for central line sepsis and gastrointestinal bleeding on April 21, 1993. I have attached and include as part of this affidavit my consultation Report of May 31, 1993, addressed to Dr. Robert F. Hunt, D.O., who is his attending physician.

The prognosis for this child with the current available mode of therapy is poor. It is inevitable that this child's liver failure will progress. The only possibility this child has to survive is with a small bowel and liver transplant. It is very difficult to say with precision what Lexen's life expectancy would be, if he does not receive a transplant. However, based on his current physical condition and on the basis of reasonable medical probability, I would estimate that without a transplant, this infant will die within the next year. Also, and maybe more importantly, Lexen is subject to gastrointestinal bleeding, central line infections, and other dangers which are attendant to his TPN feeding and his liver failure; until he receives a transplant, any of the dangers mentioned could throw him into a serious spell of illness from which he might die or survive in such poor condition that a transplant would not be feasible. Time is now critical.

Any further delay will threaten the baby's life or will diminish his chances of making an optimum recovery from the transplant.

Mario E. Tano, M.D.

The foregoing instrument was acknowledged before me this 17TH day of June, 1993, by MARIO E. TANO M.D., who is personally know to me or who has produced FLDL# T500-546-57-3330 as identification and who did take an oath.

Notary Public, State of Florida
Comm# AA 728291

My commission expires:

Notary Public, State of Florida
My Commission Expires Nov. 29, 1993
Bonded Thru Troy Fain Insurance Inc.

PITTMAN, LEXEN **MARIO TAÑO, M.D.**
MR# 630005

Date of Consultation: 05/31/93
Attending Physician: ROBERT F. HUNT, D.O.

HISTORY OF PRESENT ILLNESS: Lexen is a well-known infant to me. The child has liver failure and short-bowel syndrome and was a premature infant here at the Neonatal ICU at Broward General. Also, the child is in liver failure and recently was rejected by the State for liver and small bowel transplant. The mother, however, is pursuing this and has notified Pittsburgh for help.

The child is readmitted for line sepsis and gastrointestinal bleeding. Chronically, the child has elevated liver enzymes, elevated PT and PTT, as well as elevated bilirubin. Also chronically the child does have short-bowel syndrome and is on total parenteral nutrition. He has TPN cholestasis, which is a known complication. The child has a central line and has had recurrent episodes of infections. His last bilirubin was 24.2, which decreased to 23, his SGOT 263, now 279. His SGPT initially was 380, now 97. PT was 14.5, PTT 29.1. His triglycerides were elevated at 442, down to 279, and this was decreased on hyperalimentation. Initially he had gastrointestinal bleeding and this has resolved. He is on only clear fluids p.o., he does not take any formula orally.

PHYSICAL EXAMINATION:

VITAL SIGNS: Stable. He is on room air. Weight is not available at this time.

GENERAL: He is an alert baby, significantly jaundiced.

HEENT: Sclera is quite icteric, his facies also edematous.

NECK: Supple, with free range of motion.

CHEST: Symmetrical. There is a central line placed.

HEART: Regular rate and rhythm. No gallops, no murmurs.

LUNGS: Clear.

ABDOMEN: Protuberant. There are several surgical scars. His liver is quite enlarged, although it is quite difficult to ascertain the exact

PLAINTIFF'S EXHIBIT

PITTMAN, LEXEN **MARIO TANO, M.D.**
MR# 630005

size. Spleen is also enlarged. The abdomen also is free of masses. The bowel sounds are decreased.

EXTREMITIES: Symmetrical.

NEUROLOGICAL: The child has no gross motor or sensory deficits.

IMPRESSION: Unfortunate infant with cholestasis, liver failure, hyperbilirubinemia, elevated liver enzymes and elevated triglycerides, all of which are functions of the liver. He must also have fatty metamorphosis and fatty infiltrations which are related to TPN and cholestasis as well as liver failure.

I have explained to the mother that he certainly is at risk for all the complications from liver failure including but not limited to gastrointestinal bleeding, and certainly the only chance of survival for this child is a liver and small-bowel transplant. However, we will continue to support the child with hyperalimentation, fresh frozen plasma as needed, as well as vitamins A, D, E and K, which are the fat-soluble vitamins. The mother is well aware of the child's status. Also, the child will be treated for his CVL sepsis during this hospitalization. I will follow this child for his GI problems, although Dr. Hunt is the primary care physician and coordinates most of his medical problems.

Other suggestions are that the child have lipids reduced on the hyperalimentation to one to two times per day, since his dietary needs will be that at least 20% of his calories are from lipids. To a certain degree, his inability to digest fats is from the lack of liver function, however his dietary needs are still present. I do not feel that the child can be completely off of dietary intake of lipids. I will address this with Dr. Hunt.

MARIO TANO, M.D.

MT:ky 7402
d: 06/01/93
t: 06/01/93 2:22 P

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

LEXEN PITTMAN

Plaintiff

CASE NO. 93-6461-CIV-ROETTGER
MAGISTRATE SELTZER

by his next friend,
Ramona Pope

vs.

SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant.
_____/

AFFIDAVIT OF DR. DAVID DRUCKER

BEFORE ME, a notary public, in and for the state of Florida, duly authorized to administer and take acknowledgements, personally appeared DR. DAVID DRUCKER, who, being by me first duly cautioned and sworn, under oath, deposes and says:

I am licensed as a physician by the State of Florida. My specialty is pediatric surgeon and I am a diplomate of the American Board of Pediatrics.

I was called upon to provide care for Lexen Pittman on one occasion in November, 1992, so I am familiar with this infant and his need for a liver/small intestine transplant. I am one of the doctors who recommended that Lexen's mother contact the transplant program at the University of Pittsburgh.

I was one of the treating doctors for Lisa Cooley, a baby not much older than Lexen. Lisa also suffered from short bowel syndrome, was in liver failure, and needed a liver/small bowel transplant. A case was filed on her behalf in federal court in

PLAINTIFF'S EXHIBIT 10

Tallahassee during the last week of November, 1991, and a hearing in which medicaid coverage was sought was held on an emergency basis. On the day of the hearing, however, her condition had rapidly deteriorated, and she could not have survived long enough to receive the donor organs.

This is all to say that for infants who are identified as needing a liver/bowel transplant, time is very critical. Even if they appear to be in somewhat stable condition, babies in this condition do often deteriorate rapidly. Until he gets his transplant, Lexen Pittman is subject to many health risks including central line sepsis, gastrointestinal bleeding, common infections and viruses. Any episode caused by the above risks could cause Lexen to deteriorate quickly and die. Moreover, even if he did not die, he might survive in such a worsened condition that a transplant would not be feasible.

David Drucker, M.D.

The foregoing instrument was acknowledged before me this 17th day of JUNE, 1993, by David Drucker M.D., who is personally know to me or who has produced N/A as identification and who did take an oath.

Notary Public, State of Florida
Comm # AA728291

My commission expires:

Notary Public, State of Florida
My Commission Expires Nov. 29, 1993
Bonded Thru Troy Fain - Insurance Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

THE AGENCY FOR HEALTH
CARE ADMINISTRATION,
as successor in interest to,
SECRETARY, FLORIDA
DEPARTMENT OF HEALTH AND
REHABILITATIVE SERVICES,

Defendant,

vs. Case No.: 93-6461-CIV-ROETTGER

LEXEN PITTMAN,
by his next friend,
Ramona Pope,

Plaintiff.
_____/

NOTICE OF APPEAL

Notice is hereby given that THE AGENCY FOR HEALTH CARE ADMINISTRATION, as successor in interest to, SECRETARY, FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, defendant above named, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the Order Granting Permanent Injunction entered in this action on the 10th day of September, 1993.

Respectfully submitted,

KAREL BAARSLAG, ESQUIRE
Senior Attorney
Florida Bar #217158
Agency for Health Care
Administration
1317 Winewood Blvd.
Building 6, Room 271
Tallahassee, FL 32399-0700
(904)922-0337

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this 27th day of October, 1993, to: Mary Anne Robertson, Esquire, Legal Aid Services of Broward County, 609 Southwest First Avenue, Fort Lauderdale, Florida 33301-1885 and William Kimble, Esquire, 554 South Summit, No. 502, Fort Worth, Texas 76104.

KAREL BAARSLAG, ESQUIRE

J:\CASE\PAT.40A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

August 20, 1993

Ms. Mary Anne Robertson
Legal Aid Service, Broward Cty
609 S.W. First Avenue
Fort Lauderdale, FL 33301-1885

Re: Agency for Health Care
Administration,
v. Lexen Pittman by his next friend,
Ramona Pope
Application No. A-167

Dear Ms. Robertson:

The application for stay of orders issued by CA11 pending the filing of a petition for certiorari in the above-entitled case has been presented to Justice Kennedy who on August 20, 1993, endorsed thereon the following:

"Deny
AMK
8/20/93"

Very truly yours,

WILLIAM K. SUTER, Clerk

By Cynthia Rapp

Cynthia Rapp
Assistant Clerk

NOTE - FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

NOTIFICATION LIST

Mr. Gordon Scott
1317 Winewood Blvd
Building 6 Room 271
Tallahassee, FL 32399-0700

Ms. Mary Anne Robertson
Legal Aid Service, Broward Cty
609 S.W. First Avenue
Fort Lauderdale, FL 33301-1885

Mr. William Kimble
554 S. Summit
No. 502
Fort Worth, TX 76104

STATE OF FLORIDA
DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES

April 12, 1993

Mario E. Tano, M.D., F.A.A.P.
Children's Center for Gastroenterology
and Nutrition, P.A.
3850 Hollywood Blvd., Suite 202
Hollywood, Florida 33021

Dear Dr. Tano:

This letter is in response to your prior authorization request for a liver bowel transplant for Lexen Pittman Pope. Final medical records, transplant statistics and financial information were received on March 26. This information was then reviewed by medical consultants for Medicaid, and in accordance with the recently adopted recommendations of the HRS transplant advisory committee.

After deliberation of all relevant factors, the Medicaid program is denying your request for approval of transplant evaluation and for the liver bowel transplant. At this point in time, liver bowel transplantation is not offered or considered a covered service. In addition, this procedure is considered experimental by this state. We see nothing in these particular records or this case that warrants an exception to this policy. As you know, liver bowel transplantation is enormously expensive ($300,000-$2 million), and there is no evidence of long term survival (two to five years) for most recipients.

You have a right to appeal this decision within 30 days by filing an appeal in accordance with the provisions of Section 120.57, F.S.

Sincerely,

Gary J. Clarke
Assistant Secretary
for Medicaid

GJC/AR/mf

cc: Sarah Martin, Pittsburgh Transplantation Institute
Ramona L. Pope
Children's Medical Services (J. Michael Cupoli, M.D.)
Medicaid District Program Administrator

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

No. 93-633

THE AGENCY FOR HEALTH CARE ADMINISTRATION

Petitioner,

vs.

LEXEN PITTMAN by his next friend,
Ramona Pope

Respondent.

PROOF OF SERVICE

I, Mary Anne Robertson, do swear or declare that on this date, November 17, 1993, pursuant to Supreme Court Rules 29,3 and 29.4, I have served the attached MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Gordon Scott, Esq.
Agency for Health Care Administration
1317 Winewood Blvd.
Tallahassee, Fl 32399-0700

Mary Anne Robertson
Affiant

Subscribed ~~and~~ Sworn to Before Me
this 17th day of November, 1993.

Notary Public in and for
County and State

AVIS DUHANEY
MY COMMISSION # CC258694 EXPIRES
April 3, 1997
BONDED THRU TROY FAIN INSURANCE, INC.